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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

ROY ROMER, AS GOVERNOR OF THE STATE OF COLORADO, AND THE STATE OF COLORADO,
*Petitioners,*

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, and THE CITY COUNCIL OF ASPEN,
*Respondents.*

On Writ of Certiorari to
the Supreme Court of the State of Colorado

## BRIEF OF THE COLORADO BAR ASSOCIATION, OTHER STATE AND LOCAL BAR ASSOCIATIONS AND VARIOUS NATIONAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## BRIEF OF THE COLORADO BAR ASSOCIATION, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

## INTEREST OF THE *AMICI*

*Amici* are bar associations and other organizations from across the country that are deeply concerned with and affected by Colorado's Amendment 2. *Amici* include the State Bar of Arizona, Colorado Bar Association, Connecticut Bar Association, Delaware State Bar Association, Florida Association for Women Lawyers, Illinois State Bar Association, Kansas Bar Association, Maine State Bar Association, Massachusetts Bar Association, Minnesota State Bar Association, Minnesota Women Lawyers, State Bar of Montana, Women's Law Section, New Jersey State

Bar Association, New Mexico Women's Bar Association, New York County Lawyers' Association, Oregon State Bar, Vermont Bar Association, and the State Bar of Wisconsin, Individual Rights Section. Each bar association *amicus* has a strong interest in ensuring its ability to adopt and enforce, or to support the adoption and enforcement of, ethical canons and codes of professional conduct prohibiting discrimination of all kinds in the judicial process and in the provision of legal services. The discriminatory effects of enactments like Colorado's Amendment 2 directly threaten these interests by restricting the ability of bar associations and their members to adopt and enforce, or to support the adoption and enforcement of, anti-discrimination provisions in their respective states and, in the case of integrated bar associations, from adopting and enforcing, within the associations themselves, anti-discrimination measures protecting gay men and lesbians.

*Amici* also include several national organizations dedicated to the preservation of open and effective government, the protection of civil and constitutional rights, and the adoption and enforcement of laws prohibiting arbitrary discrimination, including discrimination on the basis of sexual orientation. The national *amicus* organizations include the Society of American Law Teachers, Common Cause, and People for the American Way.

*Amici* have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court. A complete list of *amici* and their statements of interest are set forth in Appendix A.

## INTRODUCTION

Blacks and Jews, along with farmers, smokers, joggers and redheads, can obtain protection against discrimination from the Colorado legislature, executive departments, courts, and the many state and local "agencies, branches, subdivisions and departments" that exercise governmental power. As a result of Amendment 2, lesbians and gay men cannot. The question



presented by this case is whether it is constitutional for Colorado to reconfigure the process of government in this fashion.

For petitioners that is an easy question: States possess the power to organize their political system in any manner a majority of their citizens support on any issue, provided only that no one is denied the vote and that the rights of certain constitutionally recognized "suspect classes" are protected. Any other result, say petitioners, would not only infringe upon a state's prerogatives in our federal system, but would propel the process of popular government down a hopelessly slippery slope of special interest challenges to majority rights.

*Amici* submit that this argument is fundamentally misdirected. This lawsuit is not about slippery slopes, but about level playing fields. It is not about the right of the people of Colorado, acting through established channels of political expression and representation, to enact or refuse to enact legislation on particular *issues*. Rather, it is about their asserted right to place roadblocks in the path of particular *individuals* in order to impede their ability to participate on even terms in the processes by which political issues are addressed.

No "breathtaking"[1] or "revolutionary"[2] principles need be established to protect the right to a fair political process. Nor does its recognition do "profound violence"[3] to the majority's right to allocate governmental power and to prevail after a fair fight. To the contrary, equality of participation in the political process is inherent in the concept of equal protection and should be far less controversial than the often divisive "class"-based analysis that is central to much equal protection jurisprudence.

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[1] Brief for Petitioners at 34 ("Pet. Br.").

[2] Pet. Br. at 10.

[3] *Id.*

## SUMMARY OF ARGUMENT

1. The political branches ordinarily control the division and exercise of governmental power and resources. So long as the process of government is not compromised, courts rarely have a role to play in second-guessing the judgments of the people or their elected representatives. However, where the process itself "malfunctions," the basic premise of political legitimacy is called into question and a more active form of judicial review is necessary. *See* John H. Ely, *Democracy and Distrust* 103 (1980).

2. There are two principal situations in which such a malfunction occurs. The first is where laws disadvantage "discrete and insular minorities." The second is where legislation "restricts [the] political process[]" itself. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The former may be a more familiar aspect of equal protection jurisprudence, but it is no more important on that account. Indeed, if anything can be said to be inherent in the concept of equal protection, it is that the ordinary channels for seeking "protection of the laws" should remain open to all on an equal basis. Specifically, *amici* submit that under the Equal Protection Clause states may not deny particular individuals equal access to the regularly-established, ongoing *processes* of government.

3. The right of citizens to participate in those processes on an equal footing — the right to vote, the right to be represented in a republican form of government, the right to seek legislation or petition the government for redress of grievances — is a core democratic value that has been "inferred" from the structure and traditions of our democratic system. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 562 (1964). That right is not defined, but *effectuated*, by the right to cast an effective ballot. *Id.* at 565.

4. Equal political participation can be denied not only by interference with the right to vote, but also by manipulation of the structure of the legislative process. Creating a two-tier system in which certain people are singled out and subjected to a uniquely onerous process for seeking to protect their interests violates those individuals' rights to equal protection to the same extent as laws



diluting the effectiveness of particular citizens' votes. *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *Reynolds*, 377 U.S. at 568.

5. The right to a fair political process is entirely distinct from the outcome of that process. Government action typically benefits some people while burdening others. It is precisely because this is so that states are prohibited from disabling any particular group of people from equal access to the processes by which the political distribution of such burdens and benefits is resolved. Laws dealing with a particular issue (*e.g.*, fair housing or trout fishing) do not raise an equal protection issue merely because they disproportionately affect particular individuals. On the other hand, a law which on its face simply makes it harder for a certain identified class of people to participate in the processes of day-to-day government stands on a very different constitutional footing. Such an arrangement offends equal protection of the laws regardless of whether those whom it subordinates are a so-called "suspect class."

6. The right of individuals to equal participation in the political process is not at stake where the disadvantaged class can be identified only by reference to its position on a particular matter. The concept of an "*independently* identifiable group" neatly captures the notion that equal protection extends to individuals who are identifiable apart from their views on a particular issue. Thus, a law making employment rights generally a matter of state, rather than local, concern would not raise equal protection concerns, whereas a law making the employment rights of smokers or people with blue eyes a matter of exclusive state concern would.

7. Petitioners err in asserting that the right to equal process is excessively broad or that recognizing it would fundamentally reorder the relationship between majority and minority rights. To the contrary, recognizing that everyone has a claim to participate on equal terms in seeking the protection of the laws will have no effect upon the vast majority of legislation (and other governmental action) which has nothing to do with process. Moreover, nothing prohibits a state from allocating power as it sees fit so long as it does not do so in a manner that singles out particular citizens and makes it more difficult for them, alone, to achieve political success.

8. Placing obstacles in the path of particular citizens in order to deprive them of an equal opportunity to protect their interests through the political process is a particularly pernicious form of discrimination because it flagrantly contradicts one of the most fundamental precepts of this nation's constitutional system: that, in politics, we all ought to play by the same rules and "may the best person win." When one group must run farther or surmount higher barricades to reach the same point, the system itself is unacceptably corrupted.

## ARGUMENT

### I. EQUAL ACCESS TO THE POLITICAL PROCESS IS FUNDAMENTAL TO OUR CONSTITUTIONAL SYSTEM.

*Amici* and petitioners begin at a common point: Our constitutional system relies principally upon the electorate and the political branches of government to make decisions and determine policy — to allocate benefits and impose burdens. Within broad limits, the courts have only a restricted role to play in superintending the decisions of these political branches. The fact that the government "sometimes generates outcomes with which we disagree" does not give rise to a claim for judicial intervention. *See* Ely, *supra*, at 103.

However, the assumption on which this "default system" operates is that the institutions of government are structured and function "so as to represent fairly all of the people." *Id.* at 117 (quoting *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627-28 (1969)). When that assumption does not hold, *i.e.*, "when the challenge . . . is in effect a challenge [to] this basic assumption" itself the "assumption can no longer serve as the basis for presuming constitutionality." *Id.*

There are essentially two such situations. They are the ones identified by Justice Stone in his famous footnote four in *Carolene Products:*

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

304 U.S. at 152 n.4 (citations omitted).

Justice Stone's concern with laws that disadvantage "discrete and insular minorities" — what are now more commonly referred to as "suspect classes" — has become a primary focus of equal protection jurisprudence. However, his concern about "legislation which restricts [the] political processes" is equally important.[4]

The notion that constitutional government rests on the fairness of the political process is scarcely novel, or recent. In fact, the particular genius of James Madison and the other architects of the Constitution was to focus intently upon the process by which successive governments would be selected and, once chosen, how they would represent the people who elected them. *See* Ely, *supra*, at 77-82.

The cornerstone of the system created by the framers, of course, is the principle of majority rule. Indeed, one of the driving factors behind the American Revolution was the perceived tyranny of English rule in which power was exercised by a few, from afar. However, the framers also recognized that tyranny could be imposed on minorities by the majority. As Alexander Hamilton put it succinctly in the ratification debates: "Give all power to the many, they will oppress the few. Give all power to the few, they

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[4] In fact, it was at first the more readily accepted portion of Justice Stone's formulation. *See* Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 Colum. L. Rev. 1093, 1103-04 (1982).

will oppress the many."[5] *See also The Federalist No. 51*, at 323 (James Madison) (Mentor ed., 1961) ("It is of great importance . . . not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.").

The framers understood that unfettered exercise of majority will, especially at the point of fashioning constitutive arrangements for governance,[6] would not only jeopardize the rights of minorities, it would threaten the integrity and stability of our constitutional system. Obviously, a majority could use its numerical power to grant unequal benefits to itself or impose unequal burdens on a minority. Even more dangerous, however, was the possibility that a majority would fix the very *structure* of government to ensure its own perpetual dominance or at least the perpetual subordination of a disfavored minority. *See* Robert Dahl, *A Preface to Democratic Theory* 11-17 (1956).

Hence, a central preoccupation of the constitutional debates was how to prevent these temporary majorities from restricting or foreclosing the political prospects of minorities. *See The Federalist No. 10* (James Madison). The solution has been described as "a compromise between the power of majorities and the power of minorities, between the political equality of all adult citizens on the one side and the desire to limit their sovereignty on the other." Dahl, *supra*, at 4.

One of the most important means used by the framers to mediate between majority and minority interests was to structure a political process that would be duly responsive to each. As Dean Ely describes that compromise, the Constitution leaves

> the selection and accommodation of substantive values . . . almost entirely to the political process . . . . [T]he document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with . . . process writ large — with

[5] 5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 203 (Elliott ed., 1941).

[6] *See* U.S. Const. art. V.



> ensuring broad participation in the processes and distributions of government.

Ely, *supra*, at 87 (citations omitted).

The framers also believed that they could keep majorities from abusing minorities by assuring that the tools of power were both indirect and decentralized. A decentralized, representative system would protect minorities because majorities would be coalitions of various smaller groups that would be apt to change often as different issues took on relatively greater importance. The need to build coalitions also would lead to compromise as groups would agree to make concessions on one issue in order to gain support for another.

However clear the framers' goals may have been, implementing them was another matter. *Id.* at 80-81. By the mid-nineteenth century, it had become increasingly evident that these mechanisms were not sufficient to protect minority interests since majorities tended to endure and representatives often failed to represent minority interests. Therefore, some greater measure of protection was necessary to ensure that government would not simply ignore minority rights.

The Equal Protection Clause of the Fourteenth Amendment reflects the most important attempt to resolve this continuing dilemma. At its most basic level, the Clause commands the states to represent the interests of minorities (as well as majorities) by extending to *all* persons the equal protection of the laws. As Justice Jackson put it in his famous concurrence in *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949), "there is no more effective guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *See also Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) ("the Equal Protection Clause . . . requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.") (Scalia, J., concurring). These formulations suggest — as does the very language of the Clause, "equal protection of the laws," not "protection of *equal*

laws" — a concern with process and structure at least as much as with substance or outcomes.

This case, also, is about process rather than outcomes. The central vice of Amendment 2 is that it creates a *permanent structural alteration* of the process of government in Colorado to the specific disadvantage of gay men, lesbians and bisexuals. Only they must clear a unique hurdle — a constitutional amendment — to secure protection against discrimination.

That is a "malfunction" of government which undermines the "basic assumption" upon which deference to the political process rests. In Dean Ely's words, the political process is "undeserving of trust" when

> (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.

Ely, *supra*, at 103. In such a circumstance, a "more searching" judicial review is not merely appropriate, it is necessary. In fact, such review is not only a function well-suited "to the capabilities of the courts," but is also one "which will not likely be performed elsewhere if the courts do not assume it." Alexander Bickel, *The Least Dangerous Branch* 24 (1962).

## II. THIS COURT HAS RECOGNIZED A RIGHT OF EQUAL POLITICAL PARTICIPATION WHICH INCLUDES, BUT IS NOT LIMITED TO, THE RIGHT TO VOTE.

The right to vote has been identified as a critical aspect of the right to effective political participation. This Court has considered



various aspects of that right, including vote dilution,[7] ballot access restrictions,[8] gerrymandering,[9] and voter qualifications.[10] However, the Court also has expressed unmistakable concern with efforts to corrupt the political process by creating a two-tier legislative structure in which certain individuals must traverse a more burdensome path to advance or protect their interests. *See, e.g., Hunter*, 393 U.S. at 389-91; *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474-75 (1982).

### A. The Right to Vote Is Part of a Broader Right.

Petitioners contend that the Colorado Supreme Court erred in concluding that there is a right of political participation that extends beyond the "right to vote," as such. Pet. Br. at 25-28. But that excessively narrow reading simply is not sustainable. It ignores not only the language and holdings of specific cases, but also the *articulated* premises on which they rest.

If the right to vote were the only aspect of political participation protected by the Equal Protection Clause, it would have been sufficient to stop with cases like *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), *Carrington v. Rash*, 380 U.S. 89 (1965), and *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969), in which certain individuals literally were "fenced out" of the political process by being denied the franchise. The Court, however, has made it clear that equal protection in the political process demands more than mere access to a voting booth. Indeed, as the Colorado Supreme Court observed, in cases

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[7] *See, e.g., White v. Regester*, 412 U.S. 755 (1973); *Avery v. Midland County*, 390 U.S. 474 (1968); *Lucas v. Forty-Fourth Colo. Gen. Assembly*, 377 U.S. 713 (1964).

[8] *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Williams v. Rhodes*, 393 U.S. 23 (1968).

[9] *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

[10] *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

such as *Reynolds v. Sims* no one was denied the vote. *Evans v. Romer*, 854 P.2d 1270, 1277-78 (Colo. 1993). Rather, the equal protection issue was presented by the inability of certain citizens to have an *equal and effective* opportunity to influence the outcome of the legislative process because of the way electoral districts were drawn. *Reynolds*, 377 U.S. at 561-68.

In fact, *Reynolds* directly refutes petitioners' claim that "voting" is the end-point right, rather than being supportive of a broader right to effective participation through equal process. The Court scarcely could have been more explicit:

> [E]ach and every citizen has an inalienable right to *full and effective* participation in the *political processes of his State's legislative bodies.* Most citizens can achieve *this participation* only as qualified voters .... Full and effective participation by all citizens in state government requires, *therefore,* that each citizen have an equally effective voice in the election of members of his state legislature.

377 U.S. at 565 (emphasis added); *see also Board of Estimate v. Morris*, 489 U.S. 688, 701 (1989) (aim of equal protection is to provide fair and effective representation for all citizens); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (all qualified voters have the right "to cast their votes effectively"); *Whitcomb v. Chavis*, 403 U.S. 124, 141-42 (1971).[11]

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[11] None of these principles, including the right to vote, is explicitly enumerated in the Constitution. Rather, such rights have been "*inferred* from the nature of 'a free and democratic society' and from its importance as a 'preservative of other basic civil and political rights....'" *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588 n.4 (1980) (Brennan, J., concurring) (quoting *Reynolds*, 377 U.S. at 561-62) (emphasis added). Thus, far from political participation rights being derivative of, or subsidiary to, other enumerated rights, the latter are protected, at least in part, because they are "essential to effective exercise of the power of correcting error through the *processes* of popular government." *Thornhill v. State of Alabama*, 310 U.S. 88, 95 (1940) (emphasis added) (citing *Carolene Products*); *see also Richmond Newspapers*, 448 U.S. at 587 ("the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government") (Brennan, J., concurring) (citing *Carolene Products* and Ely, *Democracy and Distrust*) (emphasis added).



Not only are petitioners mistaken about the existence (and dimension) of a political participation right, they overlook the fact that this right is rooted in the very majoritarian principles upon which they rely. In fact, assuring effective participation by all citizens in the process of government makes true majority rule possible and reinforces its legitimacy.[12]

In short, voting is not merely an end in itself, but is one of the means by which the broader right to fair process is effectuated. There is no principled reason why "all people, one process" is not as much a part of equal protection as "one person, one vote."

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[12] With apparently unconscious irony, petitioners explain that "fundamental rights" are those that are "deeply rooted in this Nation's history and tradition" (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)), or which reflect "basic choices made by the people themselves in constituting their system of government...." (quoting *Thornburgh v. American College of Obst. and Gyn.*, 476 U.S. 747, 791 (1986) (White, J., dissenting). Pet. Br. at 29. Petitioners expand upon this point by quoting from a recent law review article that warns against the "danger of expanding rights" by "remov[ing] power from the democratic process," thus "limit[ing] the capacity of self-government." Pet. Br. at 29 n.19 (citing David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 Iowa L. Rev. 1067, 1100 (1991)).

It does not seem too much of a stretch to suggest that fair and equal access to the processes of government is an idea rooted in this country's "traditions" and its "system of government." *See supra* pp. 7-10. Nor is there a need to apologize for claiming that the "democratic process" of "self-government" is furthered, not undermined, by assuring that the processes through which it operates — as opposed to the outcomes it reaches — must be nondiscriminatory.

### B. Principles Recognized by This Court in *Hunter, Seattle School District* and *Gordon* Support the Existence of a Right to Equal Participation in the Political Process.

Amendment 2 violates the Equal Protection Clause because it purposefully restricts effective access by gays, lesbians and bisexuals to the regular channels through which anti-discrimination and other political interests normally are pursued in our republican system of government. It does that in much the same way that malapportioned state legislatures once created a "legislative strait jacket"[13] for residents of more populous districts: by jiggering the process and thereby, in Judge Leventhal's words, "keeping the 'ins' in and the 'outs' out." Harold Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 380 (1977).

Petitioners seemingly do not take issue with this characterization. In fact, their brief all but concedes that if Asians or Catholics were substituted for homosexuals, lesbians and bisexuals in Amendment 2 it would be unconstitutional, without more, under cases such as *Hunter* and *Seattle School District*. The difference, say petitioners, is that the Fourteenth Amendment has a special solicitude for, *e.g.*, Asians and Catholics that it does not extend to other socially-identified groups, such as gays and lesbians, the elderly or the disabled.

We believe that this argument should be rejected *as applied to the right to participate equally in the political process*. The proposition that government may not place extra obstacles in the path of any particular group of citizens in seeking to advance their political interests is hardly a radical notion. To the contrary, it appeals to the very idea of equality of political opportunity that democratic government and equal protection of the laws embody — even more directly than Justice Stone's alternative paradigm of "discrete and insular" minorities. *See, e.g.*, Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va. L. Rev. 747, 748, 783 (1991) (a political process theory that relies solely on the "access" prong of *Carolene Products* "can

[13] *Baker v. Carr*, 369 U.S. 186, 259 (1962) (Clark, J., concurring).



avoid controversial value choices in identifying appropriate occasions for judicial review").

Contrary to petitioners' assertions, the decision below does not represent a radical departure from established constitutional principles. Rather, it is the legitimate heir to Justice Harlan's concurrence in *Hunter v. Erickson*, in which he identified the absence of a "neutral principle" for affording access to the political process as the critical vice which rendered Akron's city charter amendment constitutionally infirm under the Equal Protection Clause.

Both *Hunter* and *Seattle School District* confirm rights of equality of political access in terms broader than suspect class analysis. *Evans*, 854 P.2d at 1279-81. Thus, for example, *Hunter* focused substantial attention on Akron's selective deviation from neutral principles in its city charter amendment, which "plac[ed] special burdens on racial minorities within the governmental process." 393 U.S. at 391.[14]

The same observations can be made about Amendment 2. It places "special burdens" upon a particular group of individuals ("minorit[y]") in the "governmental process." Thus, the sole question is whether the *racial* character of the group singled out in *Hunter* was critical to the result. While some parts of the opinion undeniably focus on that aspect of the case, the opinion also articulates a broader principle which, if applied here without the slightest alteration, would be dispositive of this case. As Justice White stated for the Court, while Akron unquestionably was free to require plebiscites generally it could

> no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

*Hunter*, 393 U.S. at 393 (citations omitted).

[14] The Court also drew a specific parallel between that burden and the unequal voting regimes at issue in *Reynolds*, 377 U.S. 533, and *Avery v. Midland County, Texas*, 390 U.S. 474 (1968). *See Hunter*, 393 U.S. at 391.

That observation is particularly significant in light of Justice Harlan's concurrence. His opinion carefully delineated the broad latitude enjoyed by state and local governments to take actions that have the effect of burdening particular groups (even specially protected "suspect" ones), but only so long as the general "framework" for political decision-making is "just" and is grounded in "neutral principles." *Id.* at 393-95. The Akron charter amendment failed that test because, like Amendment 2, its aim and effect were simply to disadvantage certain citizens seeking to protect their basic political interests against discrimination.

Nearly fifteen years later, in the *Seattle School District* case, the Court identified Justice Harlan's "neutral principles" formulation as the "simple but central principle" underlying *Hunter*. 458 U.S. at 469-70. The initiative at issue in that case also was directed at racial minorities and the Court discussed that fact at length. However, as it did in *Hunter*, the Court described the vice of the law in more general terms. Specifically, the opinion noted that laws which "make it more difficult for *every* group in the community to enact comparable laws . . . 'provid[e] a just framework within which the diverse political groups in our society may fairly compete.' " *Id.* at 470. Washington's initiative, however, did " 'not attempt[ ] to allocate governmental power on the basis of any general principle' " but, rather, simply burdened the rights of specific citizens. *Id.* (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)).[15]

Two additional cases, decided within six weeks of each other, further illuminate these issues. In *James v. Valtierra*, 402 U.S.

[15] *Crawford v. Board of Education*, 458 U.S. 527 (1982), decided the same day as *Seattle School District*, highlights the point. Contrary to petitioners' incomplete reading of *Crawford*, the legislation at issue in that case transparently did not " 'fence[ ] out' an 'identifiable group' . . . from the ordinary political process." Pet. Br. at 33. Quite the opposite: the Court upheld the initiative in that case *because* it did not alter the political process. Thus, the Court distinguished *Hunter* on the ground that the initiative in *Crawford* was a "simple repeal" of legislation, whereas the Akron ordinance "involved more." 458 U.S. at 538-41.



137 (1971), the Court upheld a California referendum that required local voters to approve new low-income public housing projects. In so doing, the Court declined to extend the category of suspect classes to encompass low-income people pursuing their political interest in taxpayer-financed housing. Shortly thereafter, in *Gordon v. Lance*, 403 U.S. 1 (1971), the Court upheld constitutional and statutory provisions requiring super-majority approval of increases in bonded indebtedness after concluding that — unlike *Hunter* — the West Virginia provisions "applied equally to all bond issues for any purpose" and did not burden the rights of any "independently identifiable group." *Id.* at 5. The majority in the Colorado Supreme Court interpreted *Gordon* as having adopted a neutral principles view of *Hunter*. *Evans*, 854 P.2d at 1281-82. By contrast, both the dissent and petitioners claim that *James* is controlling, dismissing *Gordon* as irrelevant. *See* Pet. Br. at 21-22, 23 n.13; *Evans*, 854 P.2d at 1298-99 (Erickson, J., dissenting).

But *Gordon* is highly relevant, for it shows unmistakably that the Court which had decided *James* only a few weeks earlier did not, itself, regard *Hunter* as limited to suspect classes. Plainly, *James* did approach *Hunter* as a "suspect class" case and declined appellee's invitation to apply heightened scrutiny to a "class" of low-income residents. *Gordon*, however, involved no race, or other suspect class, issue. In fact, it was decided by the West Virginia Supreme Court solely as a voting case controlled by decisions such as *Reynolds*, *Kramer*, and *Wesberry v. Sanders*, 376 U.S. 1 (1964). *See Lance v. Board of Education*, 170 S.E.2d 783, 786-90 (W. Va. 1969). *Hunter* was not even mentioned.

This Court found the voting cases unpersuasive. *See Gordon*, 403 U.S. at 4-5. Instead, the Court analyzed the issues under *Hunter*. That would have been peculiar if petitioners' characterization of *James* were correct since, under their interpretation, *Hunter* would have been utterly irrelevant.[16] Thus, the Court's

[16] At most, the Court could have distinguished that decision in a brief footnote which observed that, "unlike *Hunter*, this case concededly does not involve a racial, or other suspect, classification. *See James*." Having decided *James* only a few weeks before, it is inconceivable that the

focus on *Hunter*, at a minimum, acknowledges that *Hunter* and *Gordon* are part of the same "family" of cases. And, since *Gordon* plainly had nothing to do with race, the perceived relationship must turn on the right of political participation.

The Court distinguished *Hunter* on the ground that the West Virginia laws, unlike Akron's city charter amendment, "applie[d] equally to all bond issues for any purpose" and did not "single[] out" any particular group for unique disadvantages in the political process. *Id.* at 5. Thus, the Court observed that it could "discern no *independently identifiable group* or category that favors bonded indebtedness over other forms of financing. Consequently, no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." *Id.* (emphasis added). Under those circumstances, the Court held that equal protection was not violated.

While *Gordon* referred to the fact that the ordinance at issue in *Hunter* involved a racial classification, nothing in its analysis turned on that observation. Rather, the Court's suggestion that the West Virginia provisions would have been held unconstitutional if there had been some "independently identifiable group" that "favor[ed] bonded indebtedness" strongly implies that the critical issue for constitutional purposes was the existence *vel non* of discrimination against a particular group, not whether the group discriminated against was entitled to special consideration under the Equal Protection Clause. *See id.* That implication was made manifest two pages later in the Court's statement of the controlling constitutional principle: "We conclude that *so long as* [laws] do not discriminate against or authorize discrimination against *any identifiable class* they do not violate the Equal Protection Clause." *Id.* at 7 (emphasis added).[17]

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*Gordon* Court was unaware of what it had said about *Hunter* in its earlier decision.

[17] As this Court put it more recently in *Burdick v. Takushi*, restrictions on voting are upheld "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters . . . ." 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).



*Amici* do not claim that *Gordon* is directly controlling here. What we contend is that this Court has recognized the importance of maintaining equal access to the process of government and that this case falls squarely within the category of constitutional wrongs — identified by the Court in *Hunter* and confirmed by it in *Gordon* and *Seattle School District* — in which the fatal vice is the absence of a "neutral principle" for configuring access to the political process.

## III. AMENDMENT 2 VIOLATES THE EQUAL PROTECTION CLAUSE BY DEPRIVING AN INDEPENDENTLY IDENTIFIABLE GROUP OF CITIZENS OF EQUAL PARTICIPATION IN THE PROCESSES OF GOVERNMENT.

In addition to denying the existence of a right of political participation, petitioners contend that states are free to allocate governmental authority and jurisdiction as they see fit with respect to any "issue." Pet. Br. at 11, 26, 27. Thus, for example, petitioners suggest that the Constitution does not prevent a state from making such issues as education or employment rights matters of statewide, as opposed to local, jurisdiction. Pet. Br. at 28, 31. Similarly, in their view, a law banning smoking or hunting is not subject to constitutional challenge merely because it disadvantages individuals who wish to smoke or hunt.

*Amici* do not quarrel with those propositions. However, Amendment 2 is not about *issues* and it is not about *outcomes*. It is about the political rights of *people*, to wit, gay men, lesbians and bisexuals, and about erecting obstacles which selectively disable them from effectively protecting their legal interests through the generally-available processes of government. That is a far different, and narrower, right than petitioners' unhelpful caricature of the decision below suggests.[18]

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[18] Petitioners argue that this Court should reverse the decision below because "even improvident decisions will be rectified by the democratic process and . . . judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." Pet. Br. at 18-19 (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). But that

Specifically, *amici* submit that Amendment 2 is constitutionally infirm because it singles out one group from among the many that might seek protection against discrimination in, *e.g.*, housing, employment or public accommodation and alters, for that group alone, the process for obtaining such protection. While states surely are free to allocate legal authority and jurisdiction as they see fit with respect to issues such as fair housing (or, for that matter, farming, smoking or trout fishing), it is another matter to selectively disable a particular group of citizens from seeking to protect their rights in the same forums and manner in which such issues are addressable by everyone else.[19]

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assertion simply begs the question. As discussed above, *amici* agree that the judiciary ordinarily should defer to the political judgments of the people acting directly or through their elected representatives. However, when the conditions for judicial intervention *are* met — as in this case — it is no defense to observe that the political process retains the potential to undo its own mistakes.

[19] Although understandably not denominated as such, the arguments of petitioners and *amicus* Equal Rights, Not Special Rights, Inc. ("ER/NSR") are tantamount to a plea for a new principle of non-justiciability. *Cf. Baker v. Carr*, 369 U.S. 186 (1963). As they would have it, once the people have spoken, the judiciary has no role to play in "second guessing" popular judgments so long as no suspect class is involved.

In that regard, it is important to consider Justice O'Connor's separate opinion in *Davis v. Bandemer*, 478 U.S. 109, 144 (1986). In that case, a majority of this Court held that claims of "political gerrymandering" presented justiciable claims, although the Court ultimately found that no constitutional violation had occurred. *Id.* at 143. Justice O'Connor dissented from the justiciability holding on the ground that a demand for "an equal share of political power" is not the type of issue that is properly addressed by the judiciary. *Id.* at 147.

The issue in this case is entirely different. Whether a right to some proportionate "share of political power" might appropriately be recognized in some circumstances presents a question entirely different from the issue here, where the right at stake is simply the right of individuals not to have the deck specifically stacked against them in seeking to protect their interests through the political process.



**A. Individuals, Not Issues**

The "political process" cases — from *Harper* to *Reynolds* to *Hunter* to *Gordon* — speak in terms of individuals, not issues. For purposes of their analysis it makes no difference whether the challenged inhibition rests on military status,[20] property ownership[21] or race.[22] It is the fact that the political and legal access of particular people has been discriminatorily restricted that is critical.

Petitioners and their *amici* attempt to depict this case as if the issue were the allocation of governmental authority among state and local officials and courts, or the power of the people to legislate directly through initiatives or referenda. Pet. Br. at 27-28, 31; *see also* ER/NSR Br. at 8-11. But that argument is simply miscast. We assume that the people of Colorado could, if they chose, make non-discrimination in housing a subject of statewide concern, repealing all contrary local ordinances in the process. What they clearly may not do, however, is allow local jurisdictions (or the state legislature and executive) to create, and courts to apply, laws protecting the housing rights of parents, truck drivers, veterans and the disabled, while foreclosing the ability of gay men, lesbians and bisexuals to seek comparable protections in the same forums. *See Seattle School District*, 458 U.S. at 478-79. Petitioners' repeated use of the term "group right" (although intended pejoratively) suggests that they understand this important distinction. *See* Pet. Br. at, *e.g.*, 10, 25, 28.[23]

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[20] *Carrington v. Rash*, 380 U.S. 89 (1965).

[21] *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

[22] *Hunter v. Erickson*, 393 U.S. 385 (1969).

[23] It is no defense to argue that Amendment 2 (any more than the charter amendment in *Hunter*) is directed at the *issue* of gay rights and that it creates no discrimination because it prevents *everyone* — whatever their sexual orientation — from seeking anti-discrimination legislation for gays and lesbians. In addition to evoking Anatole France's well-known observation about the law preventing rich and poor alike from sleeping under bridges, the argument misses the point in two important respects. *First*, what Amendment 2 affects is the ability of

Petitioners and ER/NSR also assert that the appropriate question to be considered is simply whether those who oppose a piece of legislation and those who favor it are treated equally. Pet. Br. at 27. However, that argument misses the heart of what is unconstitutional about Amendment 2. The pertinent issue is not whether groups seeking competing outcomes or holding opposing opinions must travel along identical routes in the political process, but whether all groups seeking the *same* kind of legislative protections must travel along identical routes. Contrary to petitioners' argument, it is only when a state treats some people differently from others in the process of seeking identical kinds of legislative benefits that the state targets *people*, rather than issues or outcomes, and thereby violates the Fourteenth Amendment. If disabled people or truck drivers or heterosexuals in Colorado want to be protected by non-discrimination laws, they may go to some court (if applicable anti-discrimination laws already exist) or to some state or local legislative body (if they do not) and seek that protection. Gay men, lesbians and bisexuals — and they alone — may not. That distinction violates their right to equal protection of the laws in the most direct sense.[24]

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certain specified *individuals* (*i.e.*, gays, lesbians and bisexuals) to obtain protection against discrimination. An *issue*, by contrast, is the type of protection those individuals might hope to obtain (*e.g.*, fair housing or other equal benefits). The problem with Amendment 2 is that to obtain any type of protection, gays and lesbians, alone, must follow a special (and especially difficult) process.

*Second*, while we are concerned here with *process*, it is process directed at an outcome. Thus, to say that everyone is equally disabled from seeking anti-discrimination legislation for gays is like saying, prior to *Reynolds* and *Lucas*, that everyone could decide to vote against special treatment for rural residents. The idea of *effective* participation implies equal process so that people may seek particular outcomes from that process.

[24] Petitioners claim that Amendment 2 imposes no special burden on gays, lesbians and bisexuals because they are free to work for the repeal of Amendment 2 through the very same process that was used to enact it. It hardly needs to be pointed out that since no law is immune from constitutional scrutiny simply by virtue of the fact that it can be repealed, the fact that Amendment 2 was created by a referendum and could be repealed by that same process does not save it from constitutional invalidity. Moreover, to argue that requiring one group — and only that group — to enact a constitutional amendment to protect itself from discrimination works no handicap on that group is to ignore the reality of the political process. *See Seattle School District*, 458 U.S. at 474-75 n.17 (rejecting the argument that compelling a group to surmount a unique obstacle in the political process resulted in no cognizable harm).



**B. "Independently" Identifiable**

*Gordon* refers to "independently identifiable group[s]" as the proper touchstone for determining whether a law affecting process denies equal protection. That is a useful formulation since it captures both the nature and the limits of the right in question.

*Gordon's* reference to a group that is "independently" identifiable is striking and cannot have been accidental. A group is independently identifiable where it can be described without reference to any particular issue. Thus, for example, in *Gordon*, people who favored bonded indebtedness demonstrably were disadvantaged by West Virginia's super-majority voting requirement. Yet, as the Court explained, that fact did not make them a protectable class for equal protection purposes since (a) the same voting requirements applied to all forms of bonded indebtedness for any "purpose" ("whether for schools, sewers or highways") and (b) the affected group was not identifiable *except* by reference to its position on that issue. 403 U.S. at 5.

By contrast, gay men and lesbians — like Hispanics, Army officers, skiers and smokers — are identifiable apart from particular issues that affect their rights. Thus, for example, it is perfectly comprehensible to speak of "Hispanics" or "veterans," as such, without relating that identity to any underlying issue, such as housing, jobs or bonded indebtedness.

Some groups, of course, are defined in whole or in part by a specific activity. Thus, unlike blacks or redheads, "farmers" are a class defined by an occupation, "poker players" by a certain recreational activity and "vegetarians" by their diet. Many laws make it harder for such groups to protect their interests in the activity which defines the class — a law repealing municipal

option legislation for poker clubs, for example. If such laws go no further than to regulate the "definitional" activity there is no basis for special equal protection concern. Put otherwise, a class defined by an activity is not — *as to regulation of that activity* — independently identifiable.

This distinction is important. As noted previously, were Colorado to adopt a constitutional amendment prohibiting cities from regulating smoking, the mere fact that *non-smokers* thereby would be disadvantaged in seeking to protect their desire for a smoke-free environment does not, in our view, raise special concerns under the Equal Protection Clause. However, if the people of Colorado, in a fit of anti-smoker hysteria, went further and precluded smokers from seeking legislation to protect themselves from arbitrary or malicious discrimination in housing, education or employment, such concern would be appropriate since the affected class ("smokers") is unrelated to (*i.e.*, is independent of) the subject matter of the prohibition (*i.e.*, housing, jobs or education).

That is, of course, the vice of Amendment 2. Unlike all of the other groups (*e.g.*, blacks, or veterans, or hunters or the elderly) who may seek anti-discrimination legislation from ordinary local or statewide lawmaking bodies in Colorado, gay men and lesbians may not. Moreover, even assuming *arguendo* that the group identified by Amendment 2 is a class defined by a particular activity — as opposed to being merely descriptive of a personal trait, such as being Hispanic or left-handed or deaf — the referendum is not limited to the activity that defines the class but, instead, flatly disables gays and lesbians from seeking *any form* of anti-discrimination protection from any branch or agency of Colorado's state or local government.

### C. Process, Not Outcome

Petitioners say that this case is about slippery slopes. *See* Pet. Br. at, *e.g.*, 12, 36-37. *Amici* submit that it is about level playing fields. Far from involving any extraordinary redefinition of our federal system or limiting the rights of majorities to prevail, the



result below and the principle on which it rests are quite narrow.[25] Only process, not outcome, is at issue.

It is, instead, Amendment 2 that is "extraordinary." Pet. Br. at 9. The Amendment creates a system in which gays, lesbians and bisexuals are singled out and subjected to a special and more onerous process in seeking to protect their political interests. Moreover, the preclusion is permanent. Put simply, Amendment 2 is a process-based obstacle course that only gays, lesbians and bisexuals are required to negotiate.[26]

There may, of course, be close cases. Constitutional issues are rarely clear-cut and lawyers tend to be both creative and tenacious. But tomorrow's difficult case is no justification for failing to deal correctly with today's easy one. *See Keller v. State Bar*, 496 U.S. 1, 15-16 (1990). Amendment 2 is, to borrow Justice

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[25] Once again, petitioners' assertions are misdirected. Because groups are not *independently* identifiable by virtue of their position on an issue and because they do not *become* independently identifiable where a referendum regulates only the activity that defines the group, it simply is not the case that *any* legislation affecting *any* group could be overturned under the principles enunciated in this case.

ER/NSR attempts to demonstrate the supposed perversity of the Colorado Supreme Court's decision by suggesting that it would have the ironic result of disabling the very people who have a particular interest in a matter from objecting to a law regarding it. ER/NSR Br. at 18-19. But such a result is not perverse at all. Rather, it is required by the very principles that petitioners and ER/NSR so vigorously espouse: namely, that majority rights are not to be put aside simply because some group has lost the vote on a particular substantive issue. Smokers have no claim to overturn a law that keeps them from smoking in restaurants. It is only if the law goes beyond that particular activity and deprives them of the same right to seek non-discrimination protection as other groups have that a constitutional issue is presented under the Equal Protection Clause.

[26] Petitioners repeatedly refer to "special" or "preferential" protections for gay men and lesbians as if this were an "affirmative action" case. *See* Pet. Br. at 9, 11, 14, 30. The argument is as misguided as its motivation is transparent. Hoping to avoid discrimination and to be treated equally is scarcely a demand for "special" consideration.

Frankfurter's phrase, an "uncouth"[27] law. Manipulating the political process now and for the future by taking certain people's rights off the table is not merely poor practice — it denies those people the ability to obtain "equal protection of the laws."

Well-settled principles recognize that equal protection is violated when certain people are "fenced out" of the political process. *Carrington*, 380 U.S. at 94. The same is true when their political effectiveness is "diluted." *Reynolds*, 377 U.S. at 555. The result should not be different merely because the "fencing out" and "dilution" take place at a different point in the process. Amendment 2 is the ultimate exercise in group gerrymandering. As such, it goes too far and is unconstitutional.

## CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be affirmed.

*Respectfully submitted,*

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[27] *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960).

## APPENDIX A

BAR ASSOCIATIONS. Each association named below is the chief membership organization for the legal profession in its state or county, or a section of such an organization, or the chief membership organization representing women attorneys in the state. Some of the *amici* associations, including Arizona and Oregon, are integrated bar associations which mandate membership by all practicing attorneys in the state. Other bar associations listed are voluntary bar associations. The State Bar of Wisconsin, an integrated bar association, has authorized participation of its Individual Rights Section.

All *amici* associations of the bar have a specific interest in insuring their continued ability to adopt and enforce or support the adoption and enforcement of ethical canons and codes of professional conduct prohibiting discrimination of all sorts in the judicial process, in the provision of legal services and in the interaction of attorneys with each other and with clients. The *amici* integrated bar associations, which would be directly affected by a provision like Amendment 2 in their respective states, also have an interest in providing equal protection of the laws to their members and those served by the legal profession. Measures, such as Amendment 2, which ban government from ever prohibiting discrimination against a targeted class of persons, would disable *amici* associations from eradicating invidious discrimination based on sexual orientation and other characteristics in the legal profession, no matter how great the need. By participating in this case, *amici* seek to ensure their ability to perform fully their duty to the legal profession and its clients.

State Bar of Arizona
Colorado Bar Association
Connecticut Bar Association
Delaware State Bar Association
Florida Association for Women Lawyers
Illinois State Bar Association
Kansas Bar Association
Maine State Bar Association
Massachusetts Bar Association
Minnesota State Bar Association

Minnesota Women Lawyers
State Bar of Montana, Women's Law Section
New Jersey State Bar Association
New Mexico Women's Bar Association
New York County Lawyers' Association
Oregon State Bar
Vermont Bar Association
State Bar of Wisconsin, Individual Rights Section

THE SOCIETY OF AMERICAN LAW TEACHERS ("SALT") is an association of more than 800 individual law faculty members, which was incorporated in 1974 by a group of law professors dedicated to improving the quality of legal education by making it more responsive to societal concerns. SALT's particular concerns have been: (1) the availability of legal services to all persons, regardless of ability to pay, and (2) the enrichment of the legal academy by the inclusion of historically underrepresented groups within the student body and the faculty. Lesbians, bisexuals and gay men constitute one of the underrepresented groups that SALT has supported over the years. The SALT Board of Governors has worked with other legal education groups to monitor the status of lesbians, bisexuals and gay men in legal education. Because of concerns about discrimination, SALT encouraged the Association of American Law Schools (AALS) to amend its Bylaw 6-4 prohibiting discrimination on the basis of race, color, religion, national origin or sex, so as to include sexual orientation (as well as age, handicap or disability). At least two AALS law schools in Colorado are affected by Amendment 2. The University of Colorado and the University of Denver, as political subdivisions of the state, would be prevented under Amendment 2 from prohibiting discrimination against their lesbian, bisexual and gay students, staff and faculty. SALT believes that it is essential to quality legal education that all persons in an educational institution, including lesbian, gay and bisexual persons, be assured that they will not be the victims of prejudicial, hateful or hostile actions.

COMMON CAUSE is a nonprofit membership corporation that promotes, on a non-partisan basis, its members' interest in open, honest and effective government and political representation.



Common Cause seeks to achieve this objective by making government more responsive to the needs and demands of citizens through government and election reform, as well as through advocacy of civil rights laws which assure the fair and equal treatment of all citizens.

PEOPLE FOR THE AMERICAN WAY is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members across the country, including in Colorado. People For has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect the civil rights of gay men and lesbians. People For regularly supports the enactment of civil rights legislation, participates in civil rights litigation and conducts programs and studies directed at reducing problems of bias, injustice and discrimination. This case is of particular importance to People For because the decision of the Colorado Supreme Court properly rejected the unacceptable concept that gay men and lesbians are second-class citizens who may be excluded from this country's political processes and denied its legal protections. It is vitally important that this Court affirm that decision and the fundamental principle that all persons, including gay men and lesbians, are entitled to the equal protection of the law.